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Establishing a Full ‘Cycle of Protection’ for Disaster Victims: Preparedness, Response and Recovery according to Regional and International Human Rights Supervisory Bodies

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Abstract

This article includes a comprehensive analysis of work currently being carried out by regional and international human rights supervisory bodies in the field of disaster management, being cognizant of the fact that the past decade has seen an increased international concern for the adequate protection of persons affected by disasters. Taking on board suggestions by Walter Kälin that effective disaster management encompasses three distinct phases, i.e. preparedness, response and recovery, jointly constituting a full ‘cycle of protection’, this paper analyzes the pronouncements of bodies specifically against this backdrop. The article argues that human rights bodies have already started to engage in clarifying human rights obligations in all these phases, which is important because our improved understanding of the (man-made) causes and consequences of disasters, and any pre-existing vulnerabilities that exacerbate impacts, might require a more holistic approach to managing disaster settings generally, including from a perspective of human rights.

Keywords

human rights; disasters; International Law Commission; preparation; response; recovery; regional; international

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1. Introduction

Over the past decade, the plight of victims of major natural and man-made disasters all around the world has caused increased international concern and dedicated attention. The recent collapse of a large textile factory in Bangladesh led to a massive international outcry over more than a thousand deaths,¹ while the occurrence of devastating natural disasters especially have led local, regional and international communities to debate the importance of improved institutional and normative frameworks of protection.²

During the past years, the international community has witnessed a number of initiatives to improve protection in disaster settings, notably in the form of standard setting for the actors involved in humanitarian action, *inter alia* as related to emergency response and disaster risk reduction. Examples of initiatives include the *International Disaster Response Laws*-project of the International Federation of the Red Cross and Red Crescent Societies;³ the 2005-2015 *Hyogo Framework for Action on Building the Resilience of Nations and Communities to Disasters*, as coordinated by the UN Office for Disaster Risk Reduction;⁴ the work of the United Nations' International Law Commission (ILC) on a set of Draft Articles on the 'Protection of Persons in the Event of Disasters';⁵ or the *African Union Convention for the Protection and Assistance of Internally Displaced Persons*,

¹ —, 'Bangladesh Textile Factories Shut Amid Unrest' (*BBC News Asia*, 14 May 2013) <www.bbc.co.uk/news/world-asia-22513861> accessed 21 May 2013; and —, 'Bangladesh Textile Workers' Deaths 'Avoidable' (*BBC News Business*, 26 April 2013) <www.bbc.co.uk/news/business-22296645> accessed 21 May 2013.

² Major disasters making the international headlines include the Indian Ocean Tsunami of 2004, the large scale earthquakes in China, Haiti, and Japan, floods in Pakistan and Chile, cyclone Nargis striking Myanmar in 2008 or the hurricanes repeatedly hitting the American Gulf Coast Region, including the United States of America. The Brookings Institution also provides comprehensive yearly overviews of natural disasters taking place around the world. Find their reports via their website: <www.brookings.edu/research/topics/natural-disasters> accessed 21 May 2013.

³ See generally on this project and relevant outcome documents: 'About the Disaster Law Programme'. <www.ifrc.org/en/what-we-do/idrl/about-idrl/> accessed 21 May 2013.

⁴ Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters: Extract from the final report of the World Conference on Disaster Reduction, UN Doc A/CONF.206/6, endorsed by UNGA Res 60/195 (2 March 2006) UN Doc A/RES/60/195 at the World Disaster Reduction Conference in 2005.

⁵ See the analytical guide on the work of ILC Special Rapporteur Valencia-Ospina and the discussions in the ILC to date at <http://untreaty.un.org/ilc/guide/6_3.htm> accessed 21 May 2013.

which is a unique treaty arranging, for the first time, explicit comprehensive protection for disaster victims in a binding manner.⁶ However, many other initiatives can be mentioned as well, such as the *Operational Guidelines on the Protection of Persons in Situations of Natural Disaster* drafted by the Inter-Agency Standing Committee or the *International Law and Standards Applicable in Natural Disaster Situations* drawn up by the International Development Law Organization.⁷

Taking note of these various initiatives, the purpose of this article will be to analyze what a distinct framework for protection of persons has to say about disaster management as it currently applies to most States, namely the well-established body of international human rights law. Indeed, most of the above mentioned initiatives seem to accept that human rights law is applicable in disaster settings and that human rights treaties generally include at least some relevant rights, such as, the rights to life, food, water, clothing, housing, health care and sanitation.⁸

This article, therefore, aims to clarify what the current human rights framework might have to say about disaster management, and it will do so by reference to the manner in which international and regional human rights supervisory have applied and interpreted their respective treaties in disaster settings to date. In fact, most human rights treaties do not contain specific provisions on human rights protection in disaster settings,⁹

⁶ African Union Convention for the Protection and Assistance of Internally Displaced Persons (adopted 23 October 2009, entered into force 6 December 2011) <<http://au.int/en/content/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>> accessed 21 May 2013.

⁷ IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disaster (revised version), (Brookings Bern Project on Internal Displacement, January 2011). <www.brookings.edu/reports/2011/0106_operational_guidelines_nd.aspx> accessed 21 May 2013 (IASC); Erica Harper, 'International Law and Standards Applicable In Natural Disaster Situations' (International Development Law Organization, 2009) <www.idlo.int/publications/Natural_Disaster_Manual.pdf> accessed 21 May 2013 (IDLO).

⁸ See for lists enumerating the possible human rights implications of (natural) disaster situations, e.g. IASC (n 7); IDLO (n 7) or Eduardo Valencia-Ospina, 'Preliminary Report on the Protection of Persons in the Event of Disasters', Special Rapporteur of the International Law Commission (5 May 2008) UN Doc. A/CN.4/598, para 26. Often, this specific set of rights is mentioned as most obviously relevant. See e.g. also: ILC, 'Protection of Persons in the Event of Disasters', Memorandum by the Secretariat (11 December 2007) UN Doc. A/CN.4/590 (Memorandum ILC) para 253; 'Law and Legal Issues in International Disaster Response: A Desk Study', International Federation of Red Cross and Red Crescent Societies, 34 <www.ifrc.org/PageFiles/41194/113600-idrl-deskstudy-en.pdf> accessed 21 May 2013 (IFRC).

⁹ There are a few notable exceptions, such as the already mentioned African Union Convention for the Protection and Assistance of Internally Displaced Persons (n 6),

therefore is especially worthwhile to examine the work of supervisory bodies in this respect.

In terms of actual scope and approach taken to this study, the analysis has been holistic, in that it has been premised on the understanding that often problems of adequate protection in disaster settings 'do not arise from purposeful policies but are the result of inadequate planning and disaster preparedness, inappropriate policies and measures to respond to the disasters, or simple neglect'.¹⁰ As also Walter Kälin, in his capacity as United Nations Special Representative on Internal Displacement, has noted:¹¹

The challenge lies in forming a *cycle of protection* that constantly adapts to the challenges posed by natural hazards and optimizes protection to those affected in order to mitigate the impact of disasters, prevent displacement and other negative consequences [...] The State is responsible for protecting the rights of its population in the context of all phases of a natural disaster. State responsibility covers not only the immediate response phase after a disaster has struck, but begins with preparedness before disaster strikes and extends to recovery, reconstruction and reinforced preparedness measures on the basis of lessons learned.

Of course, Kälin addresses natural disasters specifically, but arguably the same arguments about preparedness, prevention, mitigation, response and recovery can be made in respect of man-made disasters, such as the Bangladeshi factory collapse and deaths resulting. Indeed, it has been supported that currently we have such an advanced understanding of the causes and consequences of disasters, in terms of their (scientific) predictability and/or the (man-made) causes, consequences and vulnerabilities

entering into force only very recently in December 2012; the African Charter on the Rights and Welfare of the Child (adopted 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/24.9/49 (1990) art 23(1) and (4); or the UN Convention on the Rights of Persons with Disabilities, which will be discussed in more detail throughout, Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

¹⁰ IASC (n 7) 2.

¹¹ Walter Kälin, 'Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons: Addendum on Protection of Internally Displaced Persons in Situations of Natural Disasters' (5 March 2009) UN Doc. A/HRC/10/13/Add.1, para 21 (emphasis added); See for similar considerations IASC (n 7) 2; Valencia-Ospina, 'Preliminary Report' (n 8) paras 57-58; Peter MacAlister-Smith, *International Humanitarian Assistance: Disaster Relief Action in International Law and Organization* (Martinus Nijhoff Publishers 1984) 3-4; Global Humanitarian Assistance: A Development Initiative <www.globalhumanitarianassistance.org/data-guides/defining-humanitarian-aid> accessed 21 May 2013.

that exacerbate their impact, that we should incorporate such understandings in the manner in which we effectively manage disasters, including on the basis of human rights.¹² Striking examples of particular preexisting situations and vulnerabilities impacting on disaster situations are the observations that the large scale 2011 Japanese earthquake caused relatively few casualties in comparison to the smaller earthquakes in Chile and Haiti due to Japan's 'famed emergency preparedness and construction standards',¹³ or the fact that women and children continue to bear the brunt of the 2010 Haiti earthquake due to the pre-existing vulnerabilities of these groups in Haitian society.¹⁴

Thus, the paragraphs below will include an analysis of the work of international and regional human rights supervisory bodies in respect of all three phases of effective disaster management, i.e. preparedness in the pre-disaster phase, emergency response in the 'disaster proper' phase, and recovery in the post-disaster phase. The analysis also has taken into account both 'man-made' and 'natural' disasters settings,¹⁵ which has led to some

¹² Charles Gould, 'The Right to Housing Recovery After Natural Disasters' (2009) 22 *Harvard Human Rights Journal* 169, 171. 180-181: 'While the theory of force majeure is surprisingly resilient today, the understanding of the humanitarian and scientific communities regarding the nature of disasters has changed substantially over time. With the acknowledgement that most natural disasters are not unusual to their locations and are therefore not so unexpected, especially given the development of better science, disaster theory has advanced accordingly over the past twenty-five years. This notion that disasters might be ordinary features of affected communities, however, raises questions in regards to mitigation and vulnerability'; Jim Chen, 'Modern Disaster Theory: Evaluating Disaster Law as a Portfolio of Legal Rules' (2011) 25 *Emory International Law Review* 1121; Brian Concannon, jr. and Beatrice Lindstrom, 'Cheaper, Better, Longer Lasting: a Right-Based Approach to Disaster Response in Haiti' (2011) 25 *Emory International Law Review* 1145, 1160-62, recognizes the complexities or pre-existing disaster vulnerabilities impacting on the resulting human rights issues.

¹³ Concannon and Lindstrom (n 12) 1167.

¹⁴ E.g. Benedetta F Duramy, 'Women in the Aftermath of the 2010 Haitian Earthquake', (2011) 25 *Emory International Law Review* 1193; Jonathan Todres, 'Mainstreaming Children's Rights in Post-Disaster Settings' (2011) 25 *Emory International Law Review* 1233; IACHR, 'Two Years After the Earthquake in Haiti, the IACHR Urges the International Community to Redouble Efforts', Press Release Inter-American Commission on Human Rights, <www.oas.org/en/iachr/media_center/PReleases/2012/004.asp> accessed 13 January 2012.

¹⁵ Note that there is no general definition of 'disaster'. See e.g. Eduardo Valencia-Ospina, 'Second Report on the protection of persons in the event of disasters', Special Rapporteur of the International Law Commission (7 May 2009) UN Doc A/CN.4/615, paras 31-49; ILC, 'Report on the Work of its 60th Session' (5 May-6 June and 7 July-8 August 2008) UN Doc A/63/10, paras 232-37; Valencia-Ospina, 'Preliminary Report' (n 8) paras 44-49. The analysis in this article is based on a number of key search terms, thought relevant to relevant to disaster settings, which were used in full-text searches of the supervisory bodies' work.

interesting observations on the possible differentiation in human rights obligations in such situations.

Before embarking on the analysis, however, first a few remarks are in order on the scope and type of supervisory bodies included in the study.

2. Selection of Regional and International Supervisory Bodies

In this article, the following human rights supervisory bodies at the international and regional level concerned with the supervision of rights considered immediately relevant to protection in disasters, such as the rights to life, food, water, clothing, housing, health care and sanitation,¹⁶ were included. First of all, at the regional level, the established human rights supervisory bodies at the European, African and Inter-American regional levels were included, meaning the European Court of Human Rights (hereinafter: ECtHR), the European Committee of Social Rights, the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. However, also the fledgling regional human rights systems within the Association of South-East Asian Nations (ASEAN), the League of Arab States and the Islamic Organization of Cooperation were scrutinized.¹⁷ only the ECtHR and the African Commission on Human and Peoples Rights have recently made concrete contributions to the elaboration and recognition of human rights obligations in disaster settings, as useful for present purposes,¹⁸ therefore only the work of these bodies will be discussed in more detail below.

The terms are 'disaster', 'earthquake', 'hurricane', 'flood', 'cyclone', 'tsunami', 'explosion' and 'slide' (for 'mud slide' or 'land slide'). Also the term 'humanitarian assistance' has been used. Although the technique may be critiqued for incompleteness, it is believed, also on the basis of additional literature research, that the analysis paints a relatively complete picture of pronouncements so far.

¹⁶ See (n 8).

¹⁷ See for a full discussion of these regional systems Marlies Hesselman, Regional Human Rights Regimes and Humanitarian Obligations of States in the Event of Disaster' in Andrej Zwitter and others (eds), *Humanitarian Action: Global, Regional and Domestic Legal Responses to Local Challenges* (Cambridge University Press, forthcoming).

¹⁸ Consider for example a set of precautionary measures by the Inter-American Commission on Human Rights in 2010: 'PM 340/10 – Women and girls residing in 22 Camps for internally displaced persons in Port-au-Prince, Haiti' (2010) and IACHR, 'PM 367-10 - Forced Evictions from Five Camps for Displaced Persons, Haiti' (2010), both at <<http://www.oas.org/en/iachr/decisions/precautionary.asp>> accessed 21 May 2013.

Secondly, at the international level, this study has included the United Nations human rights treaty monitoring bodies mandated to monitor specific human rights treaties containing rights relevant to disaster management. This means that included are the Human Rights Committee (HRC), the Committee on Economic Social and Cultural Rights (CESCR), the Committee on the Elimination of all Forms of Discrimination Against Women (CteeEDAW), the Committee on the Rights of the Child (CteeRC), the Committee Against Racial Discrimination (CteeERD), and the Committee on the Rights of Persons with Disabilities (CteeRPD). While the 'UN Charter based mechanisms', i.e. the Human Rights Council and its Special Procedures, have also made some interesting contributions, as discussed elsewhere,¹⁹ these mechanisms have been excluded from the analysis at this point, since most of the regional systems do not know equivalents. Yet, it is submitted that their work supports the analysis and arguments in this contribution.

In terms of the type of documents consulted for each of the bodies, a choice was made to focus on State reporting procedures and complaints, as common features to most systems. However, for the international bodies also general interpretative statements included in General Comments or Statements have been included, as it is also relevant to learn what such bodies consider about the applicability of human rights in disaster settings generally.

Finally, a disclaimer is in order about the fact that not all of the work of supervisory bodies discussed in this article is 'legally' binding as such. In fact, none of the work of the international supervisory bodies is, although their pronouncements are generally considered 'authoritative' in nature; at this point they might be taken as a good indication of the implications of the respective human rights treaty in a specific setting and as signaling the understanding of bodies about human rights protection in disaster settings.²⁰ Of course, the judgments decided by the European Court of Human Rights in contentious cases are binding for parties; as such they are

¹⁹ Dug Cubie and Marlies Hesselman, 'Monitoring and Accountability of the Human Rights Implications of Disasters: Proposals for Systemic International Oversight' (forthcoming and on file with authors).

²⁰ See generally on the (interpretative and authoritative) work of the UN Committees, including some critical notes: Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 Human Rights Law Review 27; Philip Alston, 'The General Comments of the UN Committee on Economic Social and Cultural Rights' (2010) 104 American Society of International Proceedings 4; Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 Vanderbilt Journal of Transnational Law

of particular interest, especially when considering the relatively detailed pronouncements made.

3. Human Right Protection in the ‘Pre-Disaster Phase’: Prevention and Preparedness

The first stage of the full ‘cycle of protection’, according to the introduction, is the so-called ‘pre-disaster phase’, dealing with issues of effective preparation, prevention and mitigation. As already stated, the prime importance of adequate preparedness for disaster situations lies in the fact that often problems in disaster response ‘do not arise from purposeful policies but are the result of inadequate planning and disaster preparedness, inappropriate policies and measures to respond to the disasters, or simple neglect.’²¹ Also the ILC Special Rapporteur on the Protection of Persons in the Event of Disasters, Eduardo Valencia-Ospina, recently embarked upon the issue of preparedness and prevention in his work, which only serves to illustrate the importance of this aspect in the effective protection of persons in disaster settings.²²

Analyzing the work of the human rights supervisory bodies, we see that preparation, response and mitigation feature clearly. For example, starting with the work of the international supervisory bodies, we observe, first of all, that CteeDAW has concerned itself with the preparedness for climatic change in some of its recent work. In 2009, for example, it recommended the small island state of Tuvalu, which is very prone to flooding as a result of climatic change, to ‘develop disaster management and mitigation plans in response to the potential displacement and/or statelessness arising from environmental and climatic change’ while it also called upon Tuvalu to ensure that the position of women be included throughout the planning process.²³ Additionally, CteeDAW encouraged Tuvalu to seek assistance

905; the recent edited volume by Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012).

²¹ IASC (n 7) 2.

²² Eduardo Valencia-Ospina, ‘Sixth Report on the Protection of Persons in the Event of Disasters’, Special Rapporteur of the International Law Commission (3 May 2013) UN Doc A/CN.4/662.

²³ CEDAW, ‘Concluding Observations Tuvalu’ (7 August 2009) UN Doc CEDAW/C/TUV/CO/2, paras 55–56; Similar considerations were voiced in relation to the situation of Grenada by both CteeDAW and CteeRC. CEDAW, ‘Concluding Observations Grenada’ (21 February 2012) UN Doc CEDAW/C/GRD/CO/1-5, paras 35–36; CRC, ‘Concluding Observations Grenada’ (11 June 2010) UN Doc CRC/C/GRD/CO/2, paras 51–52: ‘The Committee also encourages the State party to put in place natural disaster preparedness programmes’.

from the Office of the United Nations High Commissioner for Refugees in doing so.²⁴ Indeed, the matter of international cooperation runs like a red thread through the work of the UN supervisory bodies and will be further addressed throughout. It suffices to state at this point, that ‘international cooperation’ for effective humanitarian assistance in disaster settings seems to stretch equally to all phases of disaster management and thus the full cycle of protection, which is of course a worthwhile observation from the perspective of a human rights approach to disaster management and the involvement of the international community therein.²⁵

Then, turning to the CESCR and CteeRC we see that the CESCR has exhorted Morocco in State reporting procedures ‘to provide assistance to earthquake victims, particularly women and children, and to take preventive action to ensure that housing is built in accordance with the rules applicable to earthquake-prone areas’.²⁶ Similarly, CESCR has recommended El Salvador to pay special attention to risk areas and take the necessary steps to guarantee the right to housing, *inter alia*, by ensuring, through ‘effective preventive measures’, that housing be constructed ‘in accordance with the standards for resisting earthquakes and cyclones, and to adopt a national territorial classification plan, avoiding construction in areas prone to natural disasters’.²⁷ In turn, the CteeRC, has pointed towards

²⁴ CEDAW, ‘Concluding Observations Tuvalu’ (7 August 2009) UN Doc CEDAW/C/TUV/CO/2, paras 55–56.

²⁵ Note that there is no single definition of humanitarian assistance, including international humanitarian assistance; however, it is clear that it can entail all three phases of disaster management according to various definitions. For example it has been supported that it relates to immediate response, to ‘reconstruction and rehabilitation’ – e.g. understood as reparation of pre-existing infrastructure (as opposed to longer-term activities designed to *improve* the level of infrastructure) – and disaster ‘prevention and preparedness’ – as referring to matters like disaster risk reduction activities, early warning systems, or assistance in putting together contingency stocks and planning. See for various definitions of humanitarian assistance, e.g. Dug Cubie, ‘An Enchanted Tool?: Humanitarian Assistance and the ILC Draft Articles on the Protection of Persons in the Event of Disasters’ (2012) 4–5 Irish Yearbook of International Law 119, 122–29; MacAlister-Smith (n 11) 4; or <<http://www.globalhumanitarianassistance.org/data-guides/defining-humanitarian-aid>> accessed 21 May 2013, including *inter alia*, the definition of the Organisation for Economic Cooperation and Development (OECD) Development Assistance Committee (DAC). Also ILC Rapporteur Valencia-Ospina supports that international cooperation stretches to the various phases of disaster management, including prevention and preparedness. He has affirmed this by proposing a specific Draft Article on ‘cooperation for disaster risk reduction’. See Valencia-Ospina, ‘Sixth Report’ (n 22), paras 70–72, 162.

²⁶ CESCR, ‘Concluding Observations Morocco’ (4 September 2006) UN Doc E/C.12/MAR/CO/3, paras 27, 51.

²⁷ CESCR, ‘Concluding Observations El Salvador’ (27 June 2007) UN Doc E/C.12/SLV/CO/2, para 39.

the need to implement disaster preparedness in school curricula,²⁸ the development and implementation of action plans or strategies on assistance and protection of children affected by natural disasters,²⁹ and the definition of ‘strategic budgetary lines’ for the protection of vulnerable and disadvantaged children, also possibly requiring (affirmative) social measures, which are available ‘even in situations of economic crisis, natural disasters or other emergencies’.³⁰ Interestingly, this latter element of ‘financial preparedness’ for disasters was also considered by CESCR more recently in the context of the right to social security; CESCR stated on this occasion that States are required to ‘consider schemes that provide social protection to individuals belonging to disadvantaged and marginalized groups, for example crop or natural disaster insurance for small farmers’. It also requires States to make sure that non-contributory schemes or other social assistance measures would be in place to support ‘those individuals and groups who are unable to make sufficient contributions for their own protection. Special attention should be given to ensuring that the social security system can respond in times of emergency, for example during and after natural disasters, armed conflict and crop failure’.³¹

Finally, the HRC and the CteeERD also both dealt with human rights protection in disasters, notably in the context of the US’ response to and

²⁸ CRC, ‘Concluding Observations Djibouti’ (7 October 2008) UN Doc CRC/C/DJI/CO/2, para 63.

²⁹ CRC, ‘Concluding Observations The Philippines’ (2 October 2009) UN Doc CRC/C/PHL/CO/3-4, para 60 (d)

³⁰ See e.g. CRC, ‘Concluding Observations Madagascar’ (8 March 2012) UN Doc CRC/C/MDG/CO/3-4, para 18, but also for observations on other countries, UN Doc CRC/C/CAN/CO/3-4 (2012) para 17; UN Doc CRC/C/DZA/CO/3-4 (2012) para 20(e); CRC/C/MMR/CO/3-4 (2012) para 18(c); UN Doc CRC/C/THA/CO/3-4 (2012) para 20(d); UN Doc CRC/C/AUS/CO/4 (2012) para 20; UN Doc CRC/C/GRC/CO/2-3 (2012) para 18(b); UN Doc CRC/C/PAN/CO/3-4 (2011) para 18(e); UN Doc CRC/C/TGO/CO/3-4 (2012) para 18 (c); UN Doc CRC/C/KHM/CO/2 (2011) para 17(f); UN Doc CRC/C/ARG/CO/3-4 (2010) para 22(b); UN Doc CRC/C/NIC/CO/4 (2010) para 20(d); UN Doc CRC/C/ECU/CO/4 (2010) para 21(b); UN Doc CRC/C/SLV/CO/3-4 (2010) para 18(c); UN Doc CRC/C/ALB/CO/2-4 (2012) para 16(d); UN Doc CRC/C/GTM/CO/3-4 (2010) para 26(e); UN Doc CRC/C/MNG/CO/3-4 (2010) para 18(b); UN Doc CRC/C/PRY/CO/3 (2010) para 17(d); UN Doc CRC/C/PRY/CO/3 (2010) para 17(d); UN Doc CRC/C/BGD/CO/4 (2009) para 21(d); UN Doc CRC/C/MRT/CO/2 (2009) para 19(c); UN Doc CRC/C/ROM/CO/4 (2009) para 16(c); UN Doc CRC/C/NER/CO/2 (2009) para 18(d); UN Doc CRC/C/NGA/CO/3-4 (2010) para 17(b); UN Doc CRC/C/CMR/CO/2 (2010) para 18(c); UN Doc CRC/C/BFA/CO/3-4 (2010) para 17(d); UN Doc CRC/C/BOL/CO/4 (2009) para 16(d); UN Doc. CRC/C/PHL/CO/3-4 (2009) para 20 (b); UN Doc CRC/C/LKA/CO/3-4 (2009) para 17(e); UN Doc CRC/C/MOZ/CO/2 (2009) para 18(e).

³¹ CESCR, ‘General Comment 19, The Right to Social Security’ (4 February 2008) UN Doc E/C.12/GC/19, paras 28, 50; See also Chen (n 12) 1130 onwards, on financial preparedness for disasters generally.

preparation for hurricane Katrina in 2005.³² Especially the HRC considered in respect of the right to life, that while various rules and regulations prohibited discrimination in disaster relief and emergency assistance, the HRC could not be sure, based on the information submitted, that poor people, in particular African-Americans, were not disproportionately disadvantaged by the implemented rescue and evacuation plans.³³ It ultimately held that the State Party should review its practices and policies in relation to 'disaster prevention and preparedness, emergency assistance and relief measures', bringing it in line with requirements of the right to life and the prohibition of direct or indirect discrimination.³⁴

Finally, the CteeRPD has pointed out in its work on the protection of persons with disabilities that disabilities be taken into account when devising 'warning procedures, evacuation and information and communications', *inter alia* referring to the need to use sign language in TV broadcasts or other strategies.³⁵ Of course, the above examples are excellent support for the notion of a full 'cycle of protection', as advocated by Kälin, considering the references to preparation for response and recovery, including the need for 'reinforced preparedness measures on the basis of lessons learned'.³⁶

Then, the case-law of the European Court of Human Rights (ECtHR) has proven especially interesting from a perspective of disaster preparedness.³⁷ A series of recent case-law sets out the current reasoning of the ECtHR on the matter, although, admittedly, some loose ends remain. The cases include: *Öneryildiz v. Turkey* (2004),³⁸ *Budayeva and others v. Turkey* (2008),³⁹ *Kolyadenko and others v. Russia* (2012)⁴⁰ and *Hadzhiyska v.*

³² E.g. CERD, 'Concluding Observations United States of America' (8 May 2008) UN Doc CERD/C/USA/CO/6, para 3.

³³ HRC, 'Concluding Observations on the United States' (18 December 2006) UN Doc CCPR/C/USA/CO/3/Rev.1, para 26.

³⁴ HRC, 'Concluding Observations on the United States' (18 December 2006) UN Doc CCPR/C/USA/CO/3/Rev.1, para 26.

³⁵ CRPD, 'Statement of the CteeRPD: Earthquake-Tsunami in Chile and Persons with Disability' (6 April 2010) para 10, <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9960&LangID=E> accessed 21 May 2013; CRPD, 'Statement of the CteeRPD in Connection with the Earthquake in Qinghai China' (23 April 2010) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9981&LangID=E> accessed 21 May 2013.

³⁶ Kälin (n 11).

³⁷ See also the considerations of Walter Kälin and Claudine Dane, 'Disaster Risk Mitigation – Why Human Rights Matter' (2008) 31 *Forced Migration Review* 38; Hesselman (n 17).

³⁸ *Öneryildiz v Turkey* App no 48939/99 (ECtHR, 30 November 2004).

³⁹ *Budayeva and others v Turkey* App no 15339/02 (ECtHR, 20 March 2008).

⁴⁰ *Kolyadenko and others v Russia* App no 17423/05 (ECtHR, 28 February 2012).

Bulgaria (2012).⁴¹ They all relate to man-made or natural disaster situations specifically, however, it is important to note that the cases are also part of a series of case-law on environmental industrial hazards and pollution,⁴² which may, in part, explain some of the idiosyncrasies of the reasoning to be set out below.

First of all, in discussing the cases, it is important to state that the cases all involve significantly different scopes, scales and consequences of disasters – some might be called incidents or accidents. To illustrate, in *Öneryildiz*, slum dwellings nearby a rubbish tip were engulfed in refuse after a methane explosion at the tip, causing 39 casualties, while *Hadzhiyska* complained about the flooding of her basement after heavy rainfall and the breaking of riverbanks, causing damage to her property. The cases of *Budayeva* and *Kolyadenko* each included a different set of facts still, *Budayeva* involving eight casualties after poorly-managed seasonal mudslides and *Kolyadenko* relating to severe flooding of dwellings as a result of a large-scale evacuation of water from a poorly maintained river reservoir, in turn necessitated by exceptionally heavy rainfall, not involving any casualties but distinct threats to persons. However, a common element to all the cases seems to be the fact that all applicants claimed an element of fault or negligence on the part of the authorities. How the ECtHR dealt with the claims is now discussed; a number of interesting observations on disaster management can be taken away from the reasoning.

First of all, in terms of larger scale disasters, the ECtHR considered that the right to life (in Article 2 of the European Convention on Human Rights) and the right to protection of the home (in Article 8) offer similar protection in disaster situations, in that each give rise to positive obligations of protection, most notably in terms of preparedness and prevention of harm.⁴³ However, at the same time, the ECtHR has also noted specifically on the nature of the right to life that:⁴⁴

Because of the fundamental importance of the right to life, the positive obligations under Article 2 include a duty to do everything within the authorities' power in the sphere of disaster relief for the protection of that right. By contrast, the obligation to protect the right to the peaceful enjoyment of

⁴¹ *Hadzhiyska v Bulgaria* App no 20701/09 (ECtHR, 15 May 2012) *inadmissible*.

⁴² *Hatton and Others v the United Kingdom* ECHR 2003-VIII; *López Ostra v Spain*, (1994) Series A no 303-C; and *Budayeva and others v Turkey* App no 15339/02 (ECtHR, 20 March 2008), para 136.

⁴³ See e.g. *Budayeva and others v Turkey* App no 15339/02 (ECtHR, 20 March 2008) para 133.

⁴⁴ *Hadzhiyska v Bulgaria* App no 20701/09 (ECtHR, 15 May 2012) *inadmissible*, para 15.

possessions is not absolute, and cannot extend further than what is reasonable in the circumstances. Accordingly, in deciding what measures to take in order to protect private possessions from weather hazards the authorities enjoy a wider margin of appreciation than in deciding on the measures needed to protect lives. Furthermore, natural disasters, which are as such beyond human control, do not call for the same extent of State involvement as dangerous activities of a man-made nature. Accordingly, the State's positive obligations to protect property against the former do not necessarily extend as far as those in the sphere of the latter.

Thus, first of all, protection under the right to life seems to require more and stricter positive protection than, for example, the right to property, even to the extent that the right to life entails a 'duty to do everything within the authorities' power in the sphere of disaster relief' to protect this right. This is because the right to life is a so-called 'absolute' or 'non-derogable' right, applying at all times and not allowing for any limitations and balancing of other interests. If we refer to the reasoning in *Budayeva* or *Kolyadenko*, we also see that while the State is in principle free to choose the measures for protection of life, positive obligations could entail, at least, making sure that a 'legislative and administrative framework designed to provide effective deterrence against threats to the right to life' is in place;⁴⁵ that 'regulatory measures' are taken; that the public is adequately informed about any life-threatening emergency; that 'early warning systems' are put in place and that proper 'defense infrastructure' is installed.⁴⁶ Also, mention was made of 'advance arrangements for emergency evacuation', determination of 'catastrophic flood hazard zones' and the adoption of appropriate 'town planning restrictions'.⁴⁷ Of course, this very much resonates with some of the pronouncements made by the international bodies as discussed above.⁴⁸

However, at the same time, the case-law of the ECtHR also evidences a complicated matter, which is the suggestion that there may be different standards of care, or different human rights obligations, stemming from the actual 'nature' of a disaster. A lower standard of care exists in case of

⁴⁵ *Kolyadenko and others v Russia* App no 17423/05 (ECtHR, 28 February 2012) paras 212, 216; *Budayeva and others v Turkey* App no 15339/02 (ECtHR, 20 March 2008) para 129.

⁴⁶ *Budayeva and others v Turkey* App no 15339/02 (ECtHR, 20 March 2008) paras 131, 149, 155, 159 including on the failure to set up temporary observation posts at the start of the mudslide season.

⁴⁷ *Kolyadenko and others v Russia* App no 17423/05 (ECtHR, 28 February 2012) paras 173, 182, 185; *Budayeva and others v Turkey* App no 15339/02 (ECtHR, 20 March 2008) paras 150, 152; See for a further discussion of case-law also: Hesselman (n 17).

⁴⁸ See for a comparison with the requirements of the *African Union Convention for the Protection and Assistance of Internally Displaced Persons* (n 6) as well Hesselman (n 17).

‘weather hazards’, as opposed to ‘man-made’ disasters. To illustrate, in *Budayeva* the ECtHR held that ‘in the sphere of emergency relief, where the State is directly involved in the protection of human lives through the mitigation of natural hazards’, the extent of positive obligations is contingent on the extent to which:⁴⁹

the circumstances of a particular case point to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use. [...] The scope of the positive obligations imputable to the State in the particular circumstances would depend on the *origin of the threat* and the *extent to which one or the other risk is susceptible to mitigation*.

Of course, this clearly suggests that the nature and origins of the disaster might matter in terms of positive action to prevent harm. At the same time, the ECtHR found a violation of positive protection in respect of the seasonal mud-slides in *Budayeva*, as it did in the cases of *Öneryildiz* and *Kolyadenko*; it did not find the case of flooding brought by *Hadzhiyska* admissible. The reasons for inadmissibility seeming related both to the relatively minor scale and damage of the events, the unpredictability of the damage and the question whether ‘the damage sustained by her may be attributed, wholly or partly, to State negligence’.⁵⁰ All in all, the case-law leaves open some questions on the application of rights in the European Convention on Human Rights in pre-disaster phases and preparedness. Again, if we accept that we currently have a much better understanding of the disaster-proneness of certain areas and/or the local vulnerabilities that exacerbate both causes and consequences,⁵¹ stricter approaches to preparedness might, in fact, be appropriate. In this sense, the outright consideration of the ECtHR that natural disasters are ‘as such beyond human control’ must arguably be challenged as well. Interestingly, this exact issue was discussed by the UN treaty bodies as well in earlier years, in the context of their practice to consider disasters as a possible ‘factor or difficulty in the implementation of the Convention’, thereby apparently giving a measure of leeway to States in case a disaster occurred during the reporting period.⁵² The bodies considered that while some of them used references to disasters in their Concluding Observations explicitly ‘to acknowledge extreme

⁴⁹ *Budayeva and others v Turkey* App no 15339/02 (ECtHR, 20 March 2008) paras 135–37 (emphasis added).

⁵⁰ *Hadzhiyska v Bulgaria* App no 20701/09 (ECtHR, 15 May 2012) *inadmissible*, para 16.

⁵¹ See the discussion above (n 12).

⁵² Note though that it is not always practically clear how such factors weigh into the actual assessment of efforts to implement human rights in a particular State.

conditions that Governments could do little to influence', other bodies held that the negative impact on human rights can often, at least in part, be traced back to particular inaction or actions of States and the manner in which they could have prepared for or mitigated the onset of such disasters.⁵³ It was proposed that it is very difficult to determine properly, in each case, whether a particular emergency should be identified as a 'factor' or 'difficulty' beyond control of the State, or whether these rather should be seen as an actual 'concern' of the Committee to be addressed more adequately by the State Party as an outcome of State reporting procedures.⁵⁴ This, of course, is a clear example of bodies still finding their way in properly viewing protection in disaster settings through a human rights lens. It is hoped that as knowledge about disasters continues to grow, including awareness about effective disaster management, humanitarian obligations of protection in such situations will also continue to crystalize accordingly.

4. Human Rights and Humanitarian Assistance in the 'Disaster Proper Phase': Immediate Response

The second phase of disaster management is then the actual emergency response in the 'disaster proper' phase. It is readily acknowledged that the actual and immediate response to a disaster is likely to present massive challenges to affected states and the international community, in that assistance may need to be provided amidst a situation of chaos and disruption of infrastructures. While the importance of proper preparedness was already discussed above, the human rights supervisory bodies have also considered the importance and applicability of human rights law in the response phase of disasters. Since the involvement of the international community is a matter of great concern in this as well, some observations on the work of supervisory bodies will be included below as well.

Again, taking a look first at the work of the international bodies, we see that especially the CESCR has been active in elaborating obligations on disaster response, notably in relation to the right to food, the right to the highest attainable standard of health, and in the context of the right to

⁵³ First Inter-Committee Meeting of the Human Rights Treaty Bodies, 'Methods of Work Relating to the State Reporting Process', Background Document prepared by the Secretariat (25 April 2002) UN Doc HRI/ICM/2002/2, para 92.

⁵⁴ Ibid.

water. Interestingly, the bulk of pronouncements on the ‘disaster proper phase’ has been elaborated in ‘General Comments’ by the CESCR, rather than in ‘Concluding’ Observations on specific States’ reports and disaster settings. Since it is important to understand the Committees concerns on human rights in disaster settings generally, these general comments will first receive some attention.

First of all, the core General Comment setting out important pronouncements on the protection of human rights disaster settings is arguably CESCR General Comment 3 on the nature of obligations of States Parties to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) generally. In General Comment 3 the CESCR elaborated the concept of ‘core-obligations’, which are said to apply at all times, regardless of any constraints, including in disaster settings.⁵⁵ The CESCR considers that all States Parties to the ICESCR are to ensure, as its *raison d’être*, particular minimum essential levels of all rights, such as basic food, shelter, health or education, if necessary with the help of internationally available resources.⁵⁶ Subsequently, it clarified over the years on disaster settings specifically that States, *inter alia*, should take steps to ensure that victims of disaster, and persons living in disaster-prone areas be provided with safe and sufficient water, if faced with difficulties to physical access to water,⁵⁷ and that victims of disaster, and people living in disaster prone areas ‘should be ensured some degree of priority in the housing sphere, under the right to adequate housing, and the accessibility of housing.’⁵⁸ In relation to the right to health the CESCR has also clearly put forward that the ‘right to treatment of diseases’ in Article 12 includes ‘the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations.’⁵⁹ Additionally, it held on a number of occasions that priority in the provision of ‘[international] medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies,

⁵⁵ CESCR, ‘General Comment 3’, The Nature of States Parties Obligations (art 2, para 1) (14 December 1990) para 10; CESCR, ‘General Comment 12’, The Right to Adequate Food (12 May 1999) UN Doc E/C.12/1999/5, para 6, 13, 15, 17, 38–39; CESCR, ‘General Comment 14’, The Right to the Highest Attainable Standard of Health (11 August 2000) UN Doc. E/C.12/2000/4, para 16, 40, 45; CESCR, ‘General Comment 15’, The Right to Water (20 January 2003) UN Doc E/C.12/2002/11, para 40.

⁵⁶ CESCR, ‘General Comment 3’ (n 55) para 10.

⁵⁷ CESCR, ‘General Comment 15’ (n 55) para 16.

⁵⁸ CESCR, ‘General Comment 4’, The Right to Adequate Housing (13 December 1991), UN Doc. E/1992/23, para 8(e).

⁵⁹ CESCR, ‘General Comment 14’ (n 55) para 12.

and financial aid should be given to the most vulnerable or marginalized groups of the population'.⁶⁰ On the right to food the CESCR was more elaborate even, stating that the 'right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement'.⁶¹ The right cannot be interpreted narrowly or restrictively to be equated with a minimum amount of calories, proteins or other specific nutrients, and all States have 'a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters'.⁶² More specifically, States have an obligation, under each of the Covenant rights, to fulfill core obligations directly should a person not be able to provide for themselves with the means at their disposal, for reasons beyond their control, including in natural disaster situations.⁶³ It has also stated that a State may have obligations to avail itself of international cooperation and assistance to address these core rights.⁶⁴ Finally, the CESCR has affirmed a special status for victims of natural disaster, considering that they 'may need special attention and sometimes priority consideration with respect to accessibility of food',⁶⁵ while food aid, when delivered, should, 'as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries'.⁶⁶ In addition, aid provided should address the needs of the intended beneficiaries and products included in aid programmes are to be safe and culturally acceptable to the recipient population.⁶⁷

Some of the other bodies have also responded to questions of human rights in immediate disaster response. For example, it was already noted that the CteeRC asks States to develop and make available 'strategic budgetary lines' in disaster situations for the protection of vulnerable children,⁶⁸ while the HRC expressed its concern over the effective denial of

⁶⁰ Ibid. 40, 65; CESCR, 'General Comment 15' (n 55) para. 60.

⁶¹ CESCR, 'General Comment 12' (n 55) para 6.

⁶² Ibid.

⁶³ Ibid. paras 15, 17.

⁶⁴ CESCR, 'General Comment 3' (n 55) paras 13-14; CESCR, 'General Comment 12' (n 55) paras. 6, 13, 15, 17, 38-39; CESCR, 'General Comment 14' (n 55) paras 16, 40, 45.

⁶⁵ CESCR, 'General Comment 12' (n 55) para 13.

⁶⁶ Ibid. para 39.

⁶⁷ Ibid.

⁶⁸ See above (n 30).

assistance to undocumented migrants in Thailand during the 2004 Indian Ocean Tsunami. The HRC held that humanitarian assistance should be provided effectively to all victims of the tsunami without discrimination, and thus regardless of their legal status.⁶⁹ In turn, the CteeDAW has also been concerned over access to services in the aftermath of disaster by women specifically.⁷⁰ It noted that female tsunami victims in Indonesia did not have their needs for (reproductive) health, clothing, housing and safety met. The CteeDAW was also concerned that households in which women were the head of the household suffered from 'discriminatory treatment in trying to get access to housing or food aid provided to male heads of the households.'⁷¹ The Committee explicitly urged Indonesia to 'eliminate all forms of discrimination against women with respect to access to housing and food aid in emergency and natural disaster situations'.⁷²

Finally, the CteeRPD has put forward some particularly interesting comments on the protection of disabled persons in the wake of natural disasters. The work of the CteeRPD is especially worthwhile since Article 11 of the *Convention on the Rights of Persons with Disabilities* requires States Parties 'to take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters'.⁷³ Effective monitoring of the implementation of this provision has even led the CteeRPD to temporarily install a special working group on the matter, which considered in a short-time span the protection of human rights in a number of specific disaster settings, i.e. in China, Haiti and Chile.⁷⁴

⁶⁹ HRC, 'Concluding Observations Thailand' (8 July 2005) UN Doc CCPR/CO/84/THA, para. 23.

⁷⁰ CEDAW, 'Concluding Observations Chile' (24 October 2012) UN Doc CEDAW/C/CHL/CO/5-6, paras 38-39.

⁷¹ CEDAW, 'Concluding Observations Indonesia' (10 August 2007) UN Doc CEDAW/C/IDN/CO/5, para 38.

⁷² *Ibid*, para 39.

⁷³ CRPD (n 9), and for an elaboration of the understanding of this article, CRPD, 'Guidelines on Treaty-Specific Document to be Submitted by States Parties under Article 35, paragraph 1, of the Convention on the Rights of Persons with Disabilities' (18 November 2009) UN Doc CRPD/C/2/3, 9.

⁷⁴ CRPD, Report of the Committee on the Rights of Persons with Disabilities to the General Assembly (2011) UN Doc A/66/55, para 31.

Examples of pronouncements by the CteeRPD include that it urged those involved in disaster response after the 2010 Haiti earthquake to include ‘a disability perspective in all humanitarian relief efforts’ and to make sure that ‘disabled, elderly and other vulnerable groups such as women and children in the community be given preferential access to food distribution, and proper sanitation facilities’.⁷⁵ It also expressed concern at the prospect of epidemics, spread of diseases and possible trauma to be caused by the earthquake, asking those involved ‘to address the specific needs of persons with disabilities in health care and rehabilitation services’.⁷⁶ References to other specific needs of persons with disabilities were included elsewhere as well, such as the impediment of movement to safer areas, loss of technical assistance for autonomy, including seeing eye dogs, or access to specific medication and treatment.⁷⁷ Interestingly, the CteeRPD has also urged that ‘rescue efforts must include the provision of medical support, and related assistance to meet the basic needs of those in distress with food, water, clothing, temporary shelter and basic sanitation’ in ensuring that victims of disaster would not become persons with disabilities.⁷⁸

All in all, there are thus abundant references to humanitarian assistance for the protection of persons in disaster proper phases in the work of the international bodies, although some matters may be subject to further crystallization in the future. In fact, from a legal point of view some of the pronouncements may be considered somewhat expansive; yet, at the same time, the work may point to a certain development in the sphere of disaster relief.

Finally, at the regional level, the African region has also seen some recent developments on the protection of persons in disaster settings. First of all, the new *African Union Convention for the Protection and Assistance of Internally Displaced Persons* confirms a number of obligations on disaster relief in the wake of disasters.⁷⁹ The African Commission on Human and Peoples’ Rights is charged with the monitoring of implementation reports,⁸⁰ which should lead to some interesting insights in the future. Unfortunately,

⁷⁵ CRPD, ‘Statement of the CteeRPD on the Rights of Persons with Disabilities on the Situation in Haiti’ (8 February 2010) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9809&LangID=E>, accessed 21 May 2013.

⁷⁶ CRPD, ‘Haiti’ (n 75).

⁷⁷ CRPD, ‘Chile’ (n 35) para 10.

⁷⁸ CRPD, ‘China’ (n 35).

⁷⁹ E.g. *African Union Convention for the Protection and Assistance of Internally Displaced Persons* art 4(2)

⁸⁰ *African Union Convention for the Protection and Assistance of Internally Displaced Persons* art 14(4); Also for further discussion Hesselman (n 17).

it is too early for any results at this point due to the Convention's recent entry into force. The same goes for the African Commission's recently adopted new reporting guidelines for State Parties to the *African Charter on Human and Peoples' Rights*, which now also include a number of references on humanitarian response in disaster settings. An example is the inquiry after steps taken to ensure that 'the right of everyone to be free from hunger and to mitigate and alleviate hunger, including in times of natural or other disasters' has been guaranteed.⁸¹ Finally, a future development should be expected from the new Intergovernmental Commission on Human Rights of the ASEAN, which is scheduled to study the protection of women and children in disasters specifically over the coming years.⁸²

To conclude this section, a few observations on the work of supervisory bodies in respect of 'international cooperation and assistance' in disaster response phases were promised. The matter of international cooperation and assistance was considered in relative detail by the ILC Special Rapporteur in his past reports, putting forward that obligations of assistance and cooperation exist, both on the part of the international community and the affected State – although some matters might still require further elaboration.⁸³

Generally, the work of the ILC reflects the pronouncements currently available from the international supervisory bodies and *vice versa*; jointly, the bodies have currently referred to obligations to request or search international help for affected States when overwhelmed,⁸⁴ both in General

⁸¹ ACHPR 'Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (Nairobi Principles), as launched by the ACHPR at its 50th session in 2011, 42, 45 <http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf> accessed 21 May 2013; ACHPR 'State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (Tunis Reporting Guidelines), 7, <http://www.achpr.org/files/instruments/economic-social-cultural-guidelines/achpr_instr_tunis_reporting_guidelines_esc_rights_2012_eng.pdf> accessed 21 May 2013.

⁸² See 'Five-year Work Plan of the ASEAN Intergovernmental Commission on Human Rights (2010-2015)' via <<http://aichr.org/documents/>> accessed 21 May 2013.

⁸³ Eduardo Valencia-Ospina, 'Fourth report on the protection of persons in the event of disasters', Special Rapporteur of the International Law Commission (11 May 2011) UN Doc A/CN.4/643; Eduardo Valencia-Ospina, 'Fifth report on the protection of persons in the event of disasters', Special Rapporteur of the International Law Commission (9 April 2012) UN Doc. A/CN.4/652.

⁸⁴ CESCR, 'General Comment 12' (n 55) para 17; CEDAW, 'Concluding Observations Belarus' (2000) UN Doc A/55/38, para 374; CRC, 'Concluding Observations Uzbekistan' (2001) UN Doc. CRC/C/111, paras 576-77; CESCR, 'Concluding Observations Uzbekistan'

Comments and State reporting, or to requirements to not arbitrarily refuse and accept offers made by international actors.⁸⁵ Additionally, it was considered that States generally are under an obligation to offer assistance, especially if they are in a position to do so.⁸⁶

While the pronouncements are thus generally supportive of international cooperation and assistance, at the same time, the practical application of international obligations, especially per Article 2(1) of the ICESCR, which requires States Parties to progressively ensure ICESCR-rights both on an *individual and joint* basis, including through international cooperation and assistance, according to maximum of available resources, is still raising a number of questions as well.⁸⁷ As such, these obligations are certainly in need of further crystallization.

5. Human Rights and Humanitarian Assistance in the ‘Post-Disaster Phase’: Recovery

Finally, the matter of ‘recovery’ from disasters and the normalization of living situations is arguably key to the effective protection of persons in the event of disasters. In this sense, the full cycle of protection approach, as supported by Kälén, might also require States to look at how disaster management can be improved in the future on the basis of lessons learned. Incorporation and monitoring of human rights protection in all three phases of disaster management can be of prime importance here, i.e. clear accountability for human rights protection in these phases can help to identify gaps in protection and determine what works and what did not.⁸⁸ It is pointed out in this respect that the ECtHR has confirmed in its case-law

(2006) UN Doc. E/2006/22, para 503; CRC, ‘Concluding Observations Honduras’ (1999) UN Doc CRC/C/87, para 112; HRC, ‘Concluding Observations DPRK’ (27 August 2001) UN Doc CCPR/CO/72/PRK, para 12.

⁸⁵ Valencia-Ospina, ‘Fourth Report’ (n 83) paras 51-77; CESCR, ‘General Comment 3’ (n 55) para 13. CESCR, ‘Statement by the Committee: An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” Under an Optional Protocol to the Covenant’ (10 May 2007) UN Doc E/C.12/2007/1, para 10; CESCR, ‘General Comment 12’ (n 55) para 19.

⁸⁶ CESCR, ‘General Comment 3’ (n 55) para 14; CESCR, ‘General Comment 12’ (n 55), para 38; CESCR, ‘General Comment 14’ (n 55) paras 40, 42, 45, 65; CESCR, ‘General Comment 15’ (n 55) para 38; CRC, ‘Concluding Observations Belarus’ (1994) UN Doc. A/49/41, para 329; CRC, ‘Concluding Observations Ukraine’ (1996) UN Doc. A/51/41, para 705.

⁸⁷ ICESCR art 2(1); See e.g. Craig Allan and Thérèse O’Donnell, ‘An Offer You Cannot Refuse? Natural Disasters, the Politics of Aid Refusal and Potential Legal Implications’ (2013) 5 Amsterdam Law Forum 36.

⁸⁸ See for an elaboration on the importance of improved monitoring and accountability in this respect, Cubie and Hesselman (n 19).

specifically the need to have avenues available to redress errors and punish breaches, and that investigative procedures should be in place to assess the disaster response afterwards, including if necessary, through judicial responses.⁸⁹ Also the *African Union Convention for the Protection and Assistance of Internally Displaced Persons* includes amongst its provisions the option of redress, even award of damages, for failed humanitarian response.⁹⁰

An important question in respect of recovery is when humanitarian responses in recovery phases move from ‘humanitarian assistance’ (of a more emergency character) to ‘international development assistance’ (of a more structural character), even though humanitarian assistance is accepted to potentially stretch to phases of preparedness, response and recovery as well.⁹¹ The question seems important as humanitarian response and structural development aid might require different actors and strategies; however, it was considered early on by the United Nations General Assembly that:⁹²

There is a clear relationship between emergency, rehabilitation and development. In order to ensure a smooth transition from relief to rehabilitation and development, emergency assistance should be provided in ways that will be supportive of recovery and long-term development. Thus, emergency measures should be seen as a step towards long-term development.

This in line with the CteeRC reprimanding Belarus for the fact that ‘assistance to people affected by the Chernobyl disaster is strictly humanitarian rather than focused on long-term policies’,⁹³ thus recommending that Belarus ‘focus more on a long-term developmental approach to assistance to people’.⁹⁴

Interestingly, Gould has pointed out in his work that disaster situations might, in a way, provide a ‘*tabula rasa*’, allowing for the effective (re)(ad) dressing of pre-disaster vulnerabilities, such as dismal housing conditions.⁹⁵ He also considers that there may be particular development

⁸⁹ See e.g. *Budayeva and others v Turkey* App no 15339/02 (ECtHR, 20 March 2008) para 138.

⁹⁰ *African Union Convention for the Protection and Assistance of Internally Displaced Persons* art 12.

⁹¹ See (n 25).

⁹² UNGA Res 46/182 (19 December 1999) UN Doc A/RES/46/182, Annex, paras 9, 40–42; Memorandum ILC (n 8) 171.

⁹³ CRC, ‘Concluding Observations Belarus’ (2002) UN Doc CRC/C/118, para 245.

⁹⁴ *Ibid.*

⁹⁵ Gould (n 12) 181; See for similar considerations by the Inter-American Commission on Human Rights on the situation in Haiti, IACHR, ‘Two Years After the Earthquake in Haiti,

opportunities which are not available in ‘regular’ underdevelopment situations, in that there are often extra amounts of international assistance and resources forthcoming, which would not be available to the affected State otherwise.⁹⁶ In this sense, international cooperation and assistance could be usefully employed to address longer-term recovery and protection of human rights, leading to better preparedness and mitigation of consequences in future disasters. With Fidler, in applying a human rights law framework to natural disasters it becomes possible to ‘extend scrutiny of disaster policy beyond short-term responses to include long-term recovery activities as part of the efforts to ensure that such activities do not discriminate on gender, racial or ethnic grounds; that the rights of children are adequately addressed; and that property rights of the poor and vulnerable are respected’.⁹⁷ That these observations hold true when analyzing the work of the supervisory bodies will now be discussed.

First of all, the CESCR has been active in mentioning, praising, or deploring the lack of States’ activities on recovery from disaster. It noted the lack of reconstruction of food production infrastructure (while also acknowledging the high costs thereof);⁹⁸ States’ efforts in creating temporary shelter and permanent rehousing;⁹⁹ and it urged Morocco to ‘redouble housing efforts’ in response to earthquakes suffered.¹⁰⁰ The HRC on the other hand has recommended the US to ensure non-discriminatory practices and the rights of the poor in the reconstruction of and access to housing, education and healthcare.¹⁰¹ Similarly, the CteeERD held in 2008 on the situation in the US after Hurricane Katrina that it:¹⁰²

remains concerned about the disparate impact that this natural disaster continues to have on low-income African American residents, many of whom

the IACHR Urges the International Community to Redouble Efforts’ (13 January 2012) Press Release Inter-American Commission on Human Rights <www.oas.org/en/iachr/media_center/PReleases/2012/004.asp> accessed 21 May 2013.

⁹⁶ Gould (n 12) 181.

⁹⁷ David Fidler, ‘Disaster Relief and Governance after the Indian Ocean Tsunami: What Role for International Law?’ (2005) 6 *Melbourne Journal of International Law* 458, 468.

⁹⁸ CESCR, ‘Concluding Observations DPRK’ (12 December 2003) UN Doc E/C.12/1/Add.95, paras 4, 8.

⁹⁹ CESCR, ‘Concluding Observations Japan’ (24 September 2001) UN Doc E/C.12/1/Add.67, para 9.

¹⁰⁰ CESCR, ‘Concluding Observations Morocco’ (4 September 2006) UN Doc E/C.12/MAR/CO/3, paras 27, 51.

¹⁰¹ HRC, ‘Concluding Observations on the United States’ (18 December 2006) UN Doc CCPR/C/USA/CO/3/Rev.1, para 26.

¹⁰² CERD, ‘Concluding Observations United States of America’ (8 May 2008) UN Doc CERD/C/USA/CO/6, para 31.

continue to be displaced after more than two years after the hurricane (art. 5 (e) (iii)). The Committee recommends that the State party increase its efforts in order to facilitate the return of persons displaced by Hurricane Katrina to their homes, if feasible, or to guarantee access to adequate and affordable housing, where possible in their place of habitual residence. In particular, the Committee calls upon the State party to ensure that every effort is made to ensure genuine consultation and participation of persons displaced by Hurricane Katrina in the design and implementation of all decisions affecting them.

Indeed, it seems that a key issue in recovery, according to many international bodies, is the effective participation of relevant groups in society in reconstruction and recovery efforts. The CESCR has referred to the need for effective participation on a number of occasions as has the CteeRPD.¹⁰³ CESCR noted, *inter alia*, that despite large resettlement programmes in the aftermath of the great Hanshin-Awaji earthquake in Japan, the population most affected was not always consulted adequately, which led many single older persons to be resettled in environments which are totally unfamiliar to them, with little or no personal attention, and with a lack of ‘community centers, access to health centers and outpatient nursing’.¹⁰⁴ On the right to housing for poorer sections of the population, the CESCR was moreover concerned that they have found it ‘increasingly difficult to finance their building reconstruction’ and meet ‘their financial obligations to public housing funds or banks’ with some persons ‘forced to sell their property in order to pay off their existing mortgages without being able to rebuild their houses’.¹⁰⁵ The CteeESCR asked Japanese authorities to assist these persons with effective measures.

The CteeRPD, in turn, has considered that disabled victims of an earthquake and tsunami in Chile be provided special support ‘to rebuild their homes, whether in urban or rural areas, as well as those sites that host associations of persons with disabilities and centres that serve them, which have been destroyed or damaged’.¹⁰⁶ CteeRPD also noted the need to provide ‘personal furniture and goods for daily use in these homes, shelters, branches and centres’ and that those awaiting reconstruction of homes should ‘be provided with dignified and accessible living spaces and of daily

¹⁰³ See e.g. CESCR, ‘Concluding Observations India’ (20 January 2008) UN Doc E/C.12/IND/CO/5, para 32, 72; CESCR, ‘Concluding Observations Japan’ (24 September 2001) UN Doc E/C.12/1/Add.67, para 27.

¹⁰⁴ CESCR, ‘Concluding Observations Japan’ (24 September 2001) UN Doc E/C.12/1/Add.67, para 27.

¹⁰⁵ *Ibid*, paras 28, 55.

¹⁰⁶ CRPD, ‘Chile’ (n 35) para 6.

use according to their needs', while in the reconstruction plans in affected areas specific issues need to be taken into account.¹⁰⁷

It is expected that with the pending study on the protection of human rights in post-disaster and post-conflict settings – focusing on 'human rights mainstreaming in relief, recovery and reconstruction efforts' – as recently mandated by the United Nations Human Rights Council, the matter of disaster recovery will receive further attention shortly.¹⁰⁸ Importantly, the aim of this study is to systemically draw together approaches of the human rights supervisory bodies to date, including the dedicated UN Special Procedures and other bodies. The first results of this study are expected at the Council's twenty-sixth session.

6. Conclusions

This article has demonstrated that international and regional human rights supervisory bodies have already made a tremendous contribution to understanding the possible human rights implications of disaster situations, in particular as related to the recognition and establishment of a full 'cycle of protection', encompassing three phases of effective disaster management: preparedness, response and recovery. Unfortunately, the work of these bodies does not always seem clearly visible, as yet, within more systemic frameworks of protection or as a distinctly applicable body of standards in such situations. It is hoped that this article draws attention to the wide range of pronouncements already made by the various bodies today – while also duly recognizing that not all of the work of the bodies is formally legally binding as such.

Recapping briefly, the international human rights treaty bodies and the European Court of Human Rights especially have been vocal about the need to adequately prepare for and prevent or mitigate the consequences of disasters, especially in respect of the rights to life, food, water, housing, health care, sanitation and social security. Jointly, they have referred to requirements for adequate housing construction, town planning restrictions, adequate warning systems, including timely information to the public, the need for regulatory measures, or the existence of appropriate defense structures. The ECtHR strictly considered that the right to life, as

¹⁰⁷ Ibid, paras 6–7.

¹⁰⁸ HRC Res 22/16, 'Promotion and protection of human rights in post-disaster and post-conflict situations' (18 March 2013) UN Doc A/HRC/22/L.23.

an absolute right, includes positive duties ‘to do everything within a State’s power in the sphere of disaster relief’ to protect that right.¹⁰⁹ At the same time, the ECtHR also recognized that positive obligations of preparation and prevention are, to a certain extent, contingent on whether a particular disaster is predictable, imminent and/or recurring in nature, and that some margin of appreciation is awarded to States in deciding upon the actual measures.¹¹⁰ However, it also ruled in respect of poorly managed seasonal mudslides, which were recurring in nature and certainly foreseeable by the authorities – although perhaps not in exact scale and timing – that a violation had occurred because of lack of preparedness towards the population, e.g. poor maintenance of observation posts and warning mechanisms.¹¹¹

This article has supported that our understanding of the causes and consequences of disasters, their geographical (scientific) predictability (in case of natural disasters mostly), and the vulnerabilities that exacerbate consequences, have increased and improved tremendously; as such disaster preparedness, prevention and mitigation becomes more important and feasible, including from a human rights perspective. The consequences of such understanding of disasters were also apparent from discussions at the UN level amongst treaty supervisory bodies, discussing that often emergency situations might be a result of neglect or indifference on the part of affected States, and could have been prevented with better preparation. At the same time, the introduction of this article also set out a host of initiatives that already clearly recognize relatively advanced standards that indicate particular developments in disaster response in all three phases of disaster settings, which can also inform the work of supervisory bodies in understanding possible human rights implications.

All in all, a human rights approach to disaster settings, as well as the full ‘cycle of protection’ perspective setting out obligations in all three phases of disasters, seem to have strong support in the elaboration of treaties by supervisory bodies in the sphere of disaster management. Of course, at this point, much of the analysis in this article has still hinged on monitoring by supervisory bodies of disaster situations *generally*, i.e. in the context of State reporting procedures; individual claims for protection remain scant as yet. However, arguably, the implications of human rights law will become especially interesting and visible when communities or individuals will start bringing actual claims for proper disaster management on the basis of

¹⁰⁹ *Hadzhiyska v Bulgaria* App no 20701/09 (ECtHR, 15 May 2012) *inadmissible*.

¹¹⁰ *Budayeva and others v Turkey* App no 15339/02 (ECtHR, 20 March 2008) paras 135, 137.

¹¹¹ See the case of *Budayeva and others v Turkey* App no 15339/02 (ECtHR, 20 March 2008).

human rights. That such claims are well possible is evidenced by the case-law of the ECtHR, as well as a few other cases, less substantively interesting for present purposes.¹¹² It is hoped that in the future, especially with the entry into force of new monitoring mechanisms and protective instruments, such as the complaints procedure under the ICESCR per 5 May 2013, the supervisory bodies will have an opportunity to further the understanding of human rights implications in disaster settings, including on the basis of individual complaints.

¹¹² Consider, for example, the inadmissible complaint before the African Commission on Human and Peoples Rights about a large oil pipe explosion causing the alleged death of 700 persons and complaints about inadequate treatment of the injured; it was found inadmissible for failure to exhaust domestic remedies, thus unfortunately it did not proceed to the merits. ACHPR, 'Communication 338/07- Socio-Economic Rights and Accountability Project (SERAP) v the Federal Republic of Nigeria' (21 November 2010) *inadmissible*, paras 1-9. See also (n 18) on the precautionary measures by the Inter-American Commission, and Hesselman (n 17) for a further discussion of these cases.